he commits a felony he is merely a 'delinquent,' and shall not be treated and punished as a criminal, is to expose society to very grave dangers." J. W. G.

TRIAL BY JUDGE AND JURY.—Under the above caption, Henry Clay Caldwell judge of the United States Circuit Court of Appeals for the Eighth Circuit, protests, in the May number of the *American Federationist,* against the tendency of judges, and especially of federal judges, in their public addresses to exalt the office of the judge at the expense of the jury. Judge Caldwell departs from the usual custom for federal judges and presents what is in some respects a very remarkable defense of the jury system. He starts out with a criticism of the uses to which the injunction is now being put and declares that it is being employed to undermine the constitutional right of trial by jury. The writ is now used for purposes, he says, which bear no more resemblance to the uses of the ancient writ than the milky way bears to the sun. Formerly it was used to conserve property in dispute between litigants, but in modern times it has taken the place of the police powers of the state and nation. It attacks and nullifies state laws upon pure questions of fact, which it refuses to submit to a jury. By means of it the judge not only restrains and punishes the commission of crimes defined by statute, but he proceeds to frame a criminal code of his own by which various acts, innocent in law and morals, are made criminal, such as standing, walking or marching on the public highway. The extremely erroneous view is beginning to prevail, he says, that the President of the United States cannot enforce the law without first obtaining the consent of a federal chancellor.

Passing to a consideration of the utility and value of trial by jury, he declares that its immense superiority to any other mode of trial in criminal cases is indisputable. The criminal law takes no note of moral justification, but only legal. It is the province of the jury to correct this defect. Thus, it will convict the assassin, but not the girl who kills her seducer. Immunity to murderers generally would soon dissolve the bonds of society; but juries instinctively feel that the social bond is not weakened, but rather strengthened, by the death of a seducer at the hands of his victim. Judges are as prone to be partial and oppressive, from personal or political prejudice, as juries and they are often more responsible for miscarriages of justice in criminal cases than juries are. Ten guilty men escape through the errors and mistakes and technical quibbles of the courts for one who escapes through an error of the jury.

"The twelve men summoned from the body of the people represent, in their several persons, different pursuits and occupations in life. Their prejudices, if they have any, resulting from their varied pursuits and environments, counteract each other; but the single judge, having no counterpoise, his bias and prejudice find full and unrestrained expression in his judgments. He is, besides, constantly struggling to force his decision into the groove of precedent, and to that end keeps on pursuing precedent and analogies and refining and refining until he grows 'wild with logic and metaphysics' and loses sight of the facts and merits of the case in hand. Juries performing casual service only can never acquire the bad habit of fixed tribunals of deciding mechanically upon some supposed precedent.

"Moreover, the consequences of an erroneous verdict by a jury are immeasurably less than an erroneous verdict by the judge; for one jury is not bound by the error of a former jury, but the law of precedent will compel the judge to adhere to his error, for it is a rule of fixed tribunals that consistency in error

is to be preferred to a right decision." Judges, as judges of the facts, have all the faults but not all the virtues of juries. "When you impeach the impartiality and integrity of the jury you impeach the impartiality and integrity of the whole body of the people, from whom they are drawn, and of which they are a representative part. Our idea of the prejudices of men is gained by our own prejudices. The difference between a prejudiced man and an enlightened one is the difference between the man who opposes our views and the man who agrees with our views. It is the old aphorism on orthodoxy and heterodoxy over again. It is always implied in this charge against the jury that there *is* a tribunal that is free from bias, passion or prejudice, and that that tribunal is found in the judge. . . .

"It is said that jury trials protract litigation, but the errors that lead to new trials and appeals and writs of error and the reversals of judgments and protraction of litigation are the errors of the judges. Look into the reports and you will find that in the trial of commonplace cases the trial court is charged with the commission of from five to fifty errors of law, and frequently convicted on some of the charges. And the errors of judges are not limited to the courts of original jurisdiction. The appellate courts themselves are constantly falling into error. If one is curious to know the extent of these errors, let him consult Bigelow's Overruled Cases, where he will find that the appellate courts, as far back as 1873, had overruled nearly 10,000 of their own decisions. How many they have overruled since that time is not known. These are their confessed errors only; there still remain, we know not how many, errors not yet confessed, for judges, like all great sinners, never confess their errors until *in extremis*—and not then with that openness, fullness and frankness supposed to be essential to insure spiritual salvation to a sinner. In a volume of the reports of the Supreme Court of Nebraska is an official list of 111 cases previously decided by that court which have been overruled by the same court.

"Judges make hundreds of mistakes in deciding the law where the jury makes one in deciding the facts; and when juries do err, it is commonly owing to the mistake of the judge in instructing them erroneously or inconsistently on the law. A jury after receiving a two-sided charge from the judge were unable to agree and when they were discharged the judge asked them how they stood, to which their foreman replied: 'Just like your honor's charge, six to six.' When the judges learn to decide the law with as much accuracy and fidelity as juries do the facts, it will be time enough for them to indulge in censorious criticism of the jury for their supposed mistakes. Such action is not only a gross invasion of the rights of the jury, but it is an invasion of the constitutional rights of the suitor, who is entitled to have a jury in the box who will not be influenced in any degree in the honest and independent exercise of their own opinion by fear of censure or the hope of applause from the judge. The free, independent mind has one opinion, and the trammeled, dependent mind another opinion; and the free, independent mind is what every suitor is entitled to have in the jury box. . . ." J. W. G.

FOLLIES IN OUR CRIMINAL PROCEDURE.—Under the above caption, Charles B. Brewer of the Maryland bar calls attention, in *McClure's* for April, to some of the absurdities in our American methods of criminal procedure which are largely responsible for the failure to punish crime in this country. He cites the following examples from actual cases, either recently decided or recently relied on as precedents for "diverting the ends of justice":